These principles apply to both the IXCs and CMRS carriers and govern the carrier surcharges and fees that are the subject of NASUCA's Petition.[65]

In order to implement its general "truth-in-billing" principles, the Commission adopted certain "minimal, basic guidelines . . . designed to prevent the types of consumer fraud and confusion evidenced in the tens of thousands of complaints we have received."[66] Under the first principle dealing with the organization of bills, the Commission directed that telephone bills must be clearly organized and include information clearly identifying the service provider associated with each charge.[67] For the second principle, dealing with full and non-misleading billed charges, the Commission adopted three guidelines addressing billing descriptions, "deniable" and "non-deniable" charges, and standardized labels for charges resulting from federal regulatory action.[68] The guidelines implementing the Commission's third principle, dealing with clear and conspicuous disclosure of inquiry contacts, included the provision of toll-free numbers for consumers to contact appropriate customer service representatives.[69]

These guidelines apply fully to the IXCs. With regard to CMRS providers, the Commission concluded that some of the guidelines it was adopting "may be inapplicable or

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[65] *Id.*, ¶ 13 ("the broad principles we adopt to promote truth-in-billing should apply to all telecommunications carriers, both wireline and wireless").

[66] *Id.*, ¶5.

[67] *Id.*, ¶¶ 28-36; *see* 47 C.F.R. § 64.2401(a).

[68] *Id.*, ¶¶ 37-65; *see* 47 C.F.R. § 64.2401(b) & (c).

[69] *Id.*, ¶¶ 66-68; *see* 47 C.F.R. § 64.2401(d).

unnecessary in the CMRS context."[70] However, the Commission indicated that it intended "to require CMRS carriers to comply with standardized labels for charges resulting from Federal regulatory action, if and when such requirements are adopted."[71] Significantly, the Commission stated that it expected:

> [T]o apply the same rule to both wireline and CMRS carriers, however, because we believe that labels assigned to charges related to federal regulatory action should be consistent, understandable, and should not confuse or mislead customers.[72]

Finally, the Commission noted that, although several of the guidelines it adopted in the *TIB Order* did not apply to wireless carriers, "such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the [1934] Act, and our decision here in now way diminishes such obligations as they may relate to billing practices of CMRS carriers."[73]

Taken together, these principles and guidelines, the Commission believed, "represent

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[70] *Id.*, ¶ 17.

[71] *Id.*, ¶ 18. In addition, the Commission made it clear that "there are two rules that we think are so fundamental that they should apply to all telecommunications common carriers," namely: (1) that the service provider associated with each charge must be clearly identified on the customer's bill, and (2) that each bill prominently display a telephone number that customers may call, free-of-charge, to question any charge on the bill. *Id.*, ¶ 17.

[72] *Id.*, ¶ 18.

[73] *Id.*, ¶ 19.

fundamental principles of fairness to consumers and just and reasonable practices by carriers."[74] Neither wireline nor wireless carriers are exempt from the application of these principles and guidelines.

B. The Carriers' Surcharges Violate The TIB Order's Second Principle – "Full and Non-Misleading Billed Charges" – And the Implementing Guidelines.

The second, broad principle adopted by the Commission in the *TIB Order* – "Full and Non-Misleading Billed Charges" – applies to the carrier surcharges at issue here. This principle requires "that bills contain full and non-misleading descriptions of charges that appear therein. . . ."[75] As discussed above, this principle applies to wireline and wireless carriers with equal rigor. With regard to why full and non-misleading description of charges should be included in all telecommunications customers' bills, the Commission stated:

> In our view, providing clear communication and disclosure of the nature of the service for which payment is expected is fundamental to a carrier's obligation of reasonable charges and practices. Indeed, we find it difficult to imagine any scenario where payment could be lawfully demanded on the basis of inaccurate, incomplete, or misleading information. Moreover, to permit such practices in the context of telecommunications services is particularly troublesome in light of the rapid technological and market developments, and associated new terminology, that can confuse even the most informed and savvy telecommunications consumer.[76]

As previously noted, the Commission adopted three specific guidelines To implement its full and non-misleading billed charges principle. These guidelines deal with: (1) billing

[74] *Id.*

[75] *Id.*, ¶ 37.

[76] *Id.*

descriptions,[77] (2) "deniable" and "non-deniable" charges,[78] and (3) standardized labels for charges resulting from federal regulatory action.[79] The IXCs' surcharges addressed herein violate the first and third guidelines. As is obvious from the review of carrier surcharges listed above, the nomenclature of the carriers' line items is, at the least, inconsistent with the Commission's goals in establishing standardized label guidelines, if not the guidelines themselves.

1. The IXCs' Surcharges Generally Fail to Meet the Commission's Guidelines for Billing Descriptions.

The Commission's first guideline for fully disclosed and non-misleading billed charges requires services included on a telephone bill to be accompanied by a "brief, clear, plain language description of the services rendered."[80] This description must be:

> [S]ufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.[81]

It is difficult to see how the IXCs' bills provide information that is sufficiently clear and specific in content, such as to allow customers to accurately assess that the services for which

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[77] *Id.*, ¶¶ 38-43.

[78] *Id.*, ¶¶ 44-48.

[79] *Id.*, ¶¶ 49-65.

[80] *Id.*, ¶ 38.

[81] *Id.*

they are being billed correspond to what they have received and that the costs assessed for those services conform to their understanding of the price charged. Surcharges identified as "regulatory assessment fees," "carrier cost recovery charges," "interstate access surcharge," "TSR administration surcharge," "universal connectivity charge," and "primary carrier charge" simply do not allow the IXCs' customers to "accurately assess" what it is they are being billed for. Nor do the surcharges, as identified on customer bills, permit customers to determine whether the amounts they are being charged conform to the price charged for service. Given the "grab bag" of putative costs each surcharge purportedly recovers (*e.g.*, property taxes, TRS costs, NANPA costs, access costs, costs of regulatory compliance and proceedings, and others), it is impossible to assess whether the IXCs' surcharges bear any relationship to the services the carriers' customers are receiving.

The situation is worse with respect to the plethora of monthly surcharges imposed by the smaller IXCs. Here the surcharges are not merely misleading, they are downright deceptive. Consider OneStar, for example. It is impossible to determine from its tariffs precisely what OneStar's "Primary Carrier Charge" is intended to recover and there is no information regarding the charge available on the carrier's website.[82] However, the "Primary Carrier Charge" is deceptively similar to the "Presubscribed Interexchange Carrier Charge" ("PICC") authorized by the Commission.[83] Similarly, OneStar's "Universal Connectivity Charge" sounds like it is

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[82]While OneStar has a "questions and answers" section on its website, none of the multitude of charges, fees and assessments it imposes on customers are discussed. *See* http://www.onestarcom.com/customerservice/faq.asp.

[83]The PICC is an inter-carrier charge local carriers are allowed to pass through to their customers who select the IXC they want to handle all 1+ toll calls unless the customer makes other (Footnote con't.)

related to the federal universal service fund, an assumption reinforced by the fact that additional surcharges related to state funds are set forth in the "Universal Connectivity Charge" portion of OneStar's tariff. Yet this assumption is contradicted by the fact that OneStar also imposes a federal USF charge pursuant to a different section of its tariff.

Or consider TalkAmerica's "TSR Administration Fee." This fee's name does not readily convey any information that would advise a consumer about what the charge is intended to recover, or whether it is mandated by regulatory action. But the surcharge's name does appear calculated to be confused with the Telecommunications Relay Service ("TRS") charges that states and the Commission have authorized carriers to recover . No doubt, many consumers – even regulators – assume that TalkAmerica's TSR fee is somehow related to TRS service.

2. The Carriers' Surcharges Do Not Meet the Commission's Guidelines Regarding Standardized Billing Labels.

In order to ensure that the principle of fully disclosed and non-misleading billed charges is achieved, the Commission required carriers to employ standardized labels for charges resulting from federal action.[84] The Commission noted that "consumers may be less likely to engage in comparative shopping among service providers if they are led erroneously to believe that certain rates or charges are federally mandated amounts from which individual carriers may not

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arrangements on a specific call. PICCs have been phased out for most large phone carriers as a result of the Commission's *CALLS Order*. *See In the Matter of Access Charge Reform*, Sixth Report and Order, CC Docket No. 96-262 *et al.*, FCC 00-193, ¶¶ 76, 105 (rel. May 31, 2000) .

[84] *TIB Order*, ¶ 49.

deviate."[85] The Commission noted considerable confusion with regard to various line item charges appearing on consumers' monthly service bills, assessed by carriers ostensibly to recover costs incurred as a result of specific government action.[86]

Although the Commission adopted, as a guideline, the requirement that carriers use standardized labels to refer to certain charges relating to federal regulatory action, it sought comment on specific labels that carriers should be obligated to adopt.[87] The Commission tentatively concluded that the labels it described were appropriate for charges related to interstate access charges, universal service contributions and local number portability. Further, the Commission tentatively concluded that the labels it described would "adequately identify the charges and provide consumers with a basis for comparison among carriers" while allowing carriers' descriptions to be succinct enough to not burden their billing systems.[88]

The Commission's concerns that carriers adequately identify their charges and that consumers be able to price shop among carriers, are each directly threatened by the carrier

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[85] *Id.*

[86] *Id.* The Commission addressed three broad types of line items that had appeared on consumers' bills: charges associated with federal universal service obligations, access related charges, and other charges associated with federal regulatory action (*e.g.*, subscriber line charge and local number portability charge). *Id.*, ¶¶ 51-52. Because the *TIB Order* did not solve problems with the universal service assessment, the Commission subsequently mandated that line items to recover the USF assessment be limited to the current assessment rate authorized by the Commission. *See Contribution Order, supra* note 17, ¶¶ 50-51.

[87] *Id.* at ¶ 72. The Commission's concern focused on three types of line item charges: those dealing with carriers' contributions for universal service, access related charges, and charges associated with federal regulatory action (such as the subscriber line charge or "SLC").

[88] *Id.*

surcharges at issue here. Experience has shown that carrier labels only further confuse consumers, and the proliferation of line items and surcharges inhibits the ability of consumers to compare the prices of telecommunications services offered by different carriers.

a. The IXCs' Surcharges Are Not Adequately Identified and Stymie Consumers' Efforts to Price Shop Among Carriers.

Many of the IXC surcharges appear to have been named in a way calculated to mislead or confuse consumers about the origin of the charge in question. For example, AT&T's "Regulatory Assessment Fee" creates the impression that it is the result of regulatory action, an impression reinforced by the nature of the costs the fee is intended to recover (*e.g.*, costs of regulatory compliance and property taxes). "Regulatory compliance and proceedings" perforce imply regulation, something only the government does. Similarly, only the government collects property taxes.

Likewise – as previously noted – TalkAmerica's "TSR Administration Fee" appears to have been calculated to be confused with otherwise proper assessments for TRS service. Similarly, OneStar's "Primary Carrier Fee" appears intended to be confused with the PICC allowed by the Commission, while OneStar's "Universal Connectivity Fee" sounds like a device to recover the company's universal service fund contribution, but that contribution is collected through a different assessment. The surcharges imposed by these carriers appear to be recovering government-authorized charges and only close examination – usually by those regularly engaged in telecommunications regulation – establishes that they are not.

The names that MCI, Sprint and BellSouth give their surcharges (*i.e.*, some variation on "carrier cost recovery") are broadly accurate in one respect: they are intended to recover various of the carrier's operating costs. However, this is not what the carriers tell their customers. Customers are advised that the carriers' surcharges recover costs that are associated with regulatory action (*e.g.*, costs of providing TRS service, costs associated with the NANP, regulatory compliance and certain property taxes). The surcharges imposed by these carriers are misleading in that the name of the charge is vague and fails to convey to customers information allowing them to readily identify what they are paying for.

b. The CMRS Providers' Surcharges Similarly Violate the TIB *Order's* "Full and Non-Misleading Billed Charges" Principle.

As previously discussed, the three broad principles enunciated in the Commission's *TIB Order*, including that requiring "Full and Non-Misleading Billed Charges," apply equally to wireless carriers. Thus, CMRS carriers' bills must contain "full and non-misleading descriptions" of the fees and surcharges they impose.[89] Although the Commission's guidelines for billing descriptions do not currently apply to CMRS carriers, the Commission expressed its intent to make wireless carriers subject to any standardized labeling guidelines that it ultimately adopted.[90] Finally, the Commission made it clear that, "notwithstanding our decision at this time not to apply these several guidelines to CMRS providers, we note that such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202" of the

[89] *Id.*, ¶ 37.

[90] *Id.*, ¶¶ 17-18. To NASUCA's knowledge, however, the Commission has never adopted final, standardized labeling requirements pursuant to the *TIB Order*.

1934 Act.[91]

In other words, application of the Commission's "full and non-misleading billed charges" principle to wireless carriers must be considered in the context of the Commission's discussion of standardized labels, as well as the provisions of Sections 201 and 202 of the 1934 Act. When viewed against this backdrop, it becomes clear that the wireless carriers' surcharges are likewise unreasonable and violate the truth-in-billing principles endorsed by the Commission. Like the wireline IXCs, wireless carriers use vague or misleading labels for their monthly surcharges. For example, there is AWS' "Regulatory Programs Fee." This label conveys precious little information to consumers, nor does the carrier's explanation of the charge shed any light ("to help fund . . . compliance with various government mandated programs which may not be available yet to subscribers"). "Various" programs?" "Government mandated?" "May not be available yet to subscribers?" It is difficult to imagine a more imprecise description of what consumers are paying for.

ALLTEL is little better, imposing a $0.41 "Regulatory Cost Recovery Fee" for expenses incurred to provide "government mandated services." The same is true for Cingular's "Regulatory Cost Recovery Fee," which "helps defray costs incurred in complying with obligations and charges imposed by State and Federal telecom regulation." For its part, Western Wireless' explanation of its fee (the charge helps "offset the cost of complying with the obligations being imposed on wireless telecommunications companies by state and federal

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[91] *Id.*, ¶ 19. Without doubt, the provisions of Sections 201 and 202 of the 1934 Act equally apply to the wireline IXCs as well.

governments)" is more in the nature of lobbying than the imparting of information.[92]

As with the IXCs' monthly surcharges, the wireless carriers fail to adequately or accurately describe what regulatory costs their surcharges purport to recover. Worse, some carriers' descriptions are flatly deceptive, purporting to recover costs – such as compliance with CALEA or E911 implementation – that are borne by other entities, in whole or part. These issues are discussed in more detail below.

3. The Carriers' Line Item Charges Also Violate The Contribution Order.

Not only do the carriers' line item charges, fees and surcharges violate the *TIB Order* in several respects, they also violate the Commission's *Contribution Order*. As NASUCA has previously pointed out, the Commission gave carriers a "green light" to impose new line items and surcharges in that order.[93] However, the Commission made it clear that it did not believe it "appropriate for carriers to characterize these administrative and other costs as regulatory fees . . . ."[94] Yet, as NASUCA has amply shown, it is *precisely* as "regulatory fees" that carriers are characterizing their various line item charges.

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[92]Surely Western Wireless is not helping offset other wireless carriers' costs, yet its monthly surcharge is not even company specific; instead it speaks of costs imposed on wireless companies generally.

[93] *Contribution Order*, ¶ 54.

[94]*Id.*

4. The Carriers' Disclaimers Heighten, Not Lessen, Customer Confusion.

Some of the IXCs[95] and CMRS carriers surveyed by NASUCA have included short disclaimers on their bills or websites regarding the source, or rather the non-source, of their surcharges. These disclaimers typically advise customers that the charge in question "is not a tax or otherwise required by the government." No doubt these carriers will assert that their disclaimers dispel any confusion customers may have about the nature of the charge.

Contrary to such arguments, the carriers' disclaimers heighten, not lessen, customers' confusion. The carriers' assertion that the charge is not required by the government is contradicted by the fact that the charge is recovering costs typically associated with regulatory action. For example, the charges cover the costs of regulatory compliance, or providing TRS service, or the NANP, or property taxes.

Customer confusion is the natural consequence of such contradictory messages. Such confusion is precisely one of the evils the Commission sought to address in the *TIB* and *Contribution Orders*. As the Commission noted, "the names associated with line item charges as well as accompanying descriptions . . . may convince consumers that all of these fees are federally mandated."[96]

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[95]Not, however, VarTec, TalkAmerica, OneStar or MCI. These carriers have made no attempt to alleviate customers' confusion that results from the carriers' use of vague or inaccurate descriptions of the charges in issue.

[96]*TIB Order*, ¶ 53.

C. Even If Not Specifically Prohibited by the TIB Order, the Carriers' Surcharges Should Be Prohibited on the Grounds that they Are Misleading and Therefore Unreasonable and Unjust Under Sections 201 and 202 of the 1934 Act.

1. The Carriers' Surcharges Are Misleading and Deceptive in Their Application.

More invidious, and more subtly violating the pro-consumer, pro-competition goals of the telecommunications laws that were intended to be furthered by the Commission's *TIB Order*, is the carriers' overall pricing strategy. Succinctly put, the surcharges are simply devices designed to increase the carriers' revenues without raising their monthly or usage-based rates for the telecommunications services provided. In the competitive market, in which consumers generally shop among carriers based on rate information, these surcharges mask the true cost of a carrier's service and make it difficult for consumers to make an "apples-to-apples" comparison of the cost of carrier service.[97] The surcharge regime adopted by the carriers is, therefore, inherently misleading and deceptive, and should be prohibited.

Take, for example, AT&T's Regulatory Assessment Fee. AT&T has reduced its per minute rates for long distance service over the years, both in response to competition and in response to regulatory directives from state commissions. AT&T generally trumpets these rate reductions to the public and regulatory bodies. What AT&T does not trumpet, however, is the fact that these rate reductions have been offset, at least in part, by the imposition of unavoidable

[97] Although the Commission has a policy of letting competition establish efficient rates to the extent possible, it has previously recognized that because of averaging and mark-ups of surcharges by carriers "...customers are prevented from making head-to-head comparisons among local service providers." *CALLS Order*, ¶ 19; *see also Contribution Order*, ¶ 50.

surcharges and fees.[98]

The regulatory surcharges being imposed by the IXCs and CMRS carriers apply to virtually all residential customers, across the spectrum of calling plans. The surcharges are not tied to a particular calling plan or to a particular type of call (*e.g.*, payphone card calls, collect calls, third party calls, etc.). The carriers' regulatory surcharges produce millions of dollars in revenue each month and increase the effective cost of telecommunications service for the majority of the carriers' customers.

To be clear: NASUCA is *not* opposed to carriers recovering their costs of doing business. Nor is NASUCA opposed to carriers making a profit. What NASUCA *is* opposed to is the inherently misleading means by which carriers are recovering those costs and making their profits – by imposing ever-increasing line items, surcharges and fees on customers, while at the same time advertising low monthly and per minute rates for the telecommunications services offered.[99] Such practices are inherently deceptive, misleading, and unreasonable. No amount of explanation on the bill can change this basic fact. The Commission should therefore disallow the

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[98] *See* Wallack, "Telephone rates are rising at a blistering pace."

[99] Compare AT&T's action in selling long distance to selling gasoline, an ostensibly fully competitive product. In West Virginia, for example, the price per gallon advertised by a service station (*e.g.*, roughly $1.75 per gallon for 87 octane) includes approximately $0.44 per gallon in state and federal taxes. A service station is not allowed, however, to advertise its gas for $1.31 per gallon, with a notice on the pump stating – in fine print – that the price does not include $0.44 per gallon in taxes. Such behavior is disallowed because, otherwise, consumers would think they are paying less than they would be at competing stations. Under state and federal regulations, gas stations may explain to customers the magnitude of taxes imposed on gasoline by any means at their disposal. However, state and federal regulations mandate that they not mislead consumers by advertising one price and charging another.

use of such monthly fees, line items and surcharges as a means of recovering ordinary operating costs under the guise of government-mandated or imposed charges.

2. The Commission's Joint Policy Statement Regarding Advertising of Dial-Around and Other Services Further Suggests that the Carrier Line Item Charges in Question are Unjust and Unreasonable.

The Commission's joint policy statement with the Federal Trade Commission ("FTC") regarding carrier advertising of dial-around services further suggests that the carrier line item charges are misleading or deceptive, and therefore constitute unjust and unreasonable practices under Section 201(b) of the 1934 Act.[100] Although the subject of the *Advertising Joint Policy* concerned advertising *per se* rather than billing practices, the same observations and concerns noted by the Commission and the FTC apply since carriers win customers by advertising their rates but that advertising does not include information regarding the myriad line item charges, fees and surcharges identified in this Petition. Nor do the disclaimers and other information regarding these line items, to the extent they are even provided by the carriers, remedy the misleading and deceptive promotion of low rates without adequately informing consumers of the real costs of that service.[101] This is made clear by the parallels between the consumer protection concerns expressed in both the *TIB Order* and the *Advertising Joint Policy*, as well as the measures designed to protect consumers in both decisions.[102]

[100] *See* In the Matter of Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers, *Policy Statement*, File No. 00-72, FCC 00-72, (rel. March 1, 2000) ("*Advertising Joint Policy*").
[101] *Id.*, ¶ 4.
[102] For example, the Commission noted that the "fundamental principles" enunciated in the *Advertising Joint Policy* "apply across the board" and that misleading information in ads for dial-around services would likely be deceptive in ads for long-distance dialing plans in the same misrepresentations or omissions occurred. *Id.*, ¶ 9. The Commission also noted that "the same
(Footnote con't.)

Like the concerns with the increase in complaints regarding slamming, cramming and misleading bills voiced in its *TIB Order*, the Commission's *Advertising Joint Policy* was intended to deal with "the proliferation of advertisements for dial-around numbers, long-distance calling plans, and other new telecommunications services, as well as an increase in the number of complaints regarding how these services are promoted."[103] Like its observations in the *TIB Order*, the Commission noted the critical importance of accurate information in carrier advertising of long-distance services and rates. However, the Commission's *Advertising Joint Policy* illustrates why the carriers' billing practices violate the Commission's *TIB Order* and otherwise constitute unjust and unreasonable practices.

The Commission's observations regarding what constitutes deceptive advertising is instructive in considering what ought to constitute deceptive billing practices. In the *Joint Advertising Policy*, the Commission wrote:

> *A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances about a material fact.* Material facts are those that are important to a consumer's decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. *The cost of a product or service is an example of an attribute presumed material.*[104]

The Commission agreed too, with the very point NASUCA makes in this Petition – namely that price is the "central characteristic" considered by consumers, "*not just the per-minute rate, but*

standards of truthfulness apply regardless of the medium advertisers choose to communicate their message to consumers," regardless of whether that medium is television, radio, magazines, newspapers, direct mail, telemarketing, the Internet or oral representations made by customer service representatives. *Id.*

[103] *Id.*, ¶ 3.

[104] *Id.*, ¶ 5.

rather how that rate, along with all additional fees and charges, will ultimately be reflected in the charges [consumers] see on their monthly phone bills."[105]

"The issue," the Commission wrote, "is whether the act or practice is likely to mislead, rather than whether it causes actual deception."[106] In order to make this determination, the Commission looks to the "net impression" conveyed to consumers by the ad in question, "the entire mosaic, rather than each tile separately." Under this standard, which considers the entire ad, transaction or course of dealing, "even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading." [107]

Applying this "net impression" standard to the carrier billing practices complained of by NASUCA, it is manifest that consumers are misled regarding the true cost of the service they are receiving from their carriers by the inclusion of separate line items, surcharges and fees. In the *Joint Advertising Policy*, the Commission observed that "in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller."[108] Accurate information contained in the text of the ad, the Commission noted, may not remedy a misleading impression created by a headline, and disclosures in the fine print or legalistic or ambiguous disclaimers likewise do not cure the problem. Similarly, the same "bait and switch" problems are inherent in the carriers' billing practices complained of by NASUCA. The line item charges are deceptively or misleadingly labeled, information regarding these charges often appears only in the fine print on

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[105] *Id.*, ¶ 13 (emphasis added).
[106] *Id.*, ¶ 6.
[107] *Id.*
[108] *Id.*, ¶ 8.

the customer's bill. Moreover, the disclaimers provided by the carriers on their websites or monthly billing statements (where they are even provided) are unlikely to actually be noticed by the customers, and even if noticed, are too vague or misleading to be understood.[109]

Given the scope of the problem, the appropriate remedy is not to issue simply another directive to carriers to provide more accurate information, or even to try to craft guidelines or rules to address the "entire mosaic" of misleading statements contained on bills, websites or "welcome packages." Rather, the Commission should employ the most straightforward solution to the problem: Prohibit the use of line items to recover carriers' operating costs, except in those instances when the line items are expressly mandated by the federal, state or local government.

3. The Surcharges Are Excessive and Bear No Demonstrable Relationship to the Regulatory Costs They Purport to Recover.

a. The IXCs' Surcharges.

As discussed above, some IXCs claim that their surcharges recover costs imposed as a result of specific Commission-imposed requirements, such as compliance with the NANP or the provision of TRS for the hearing-impaired. These surcharges also purportedly recover the carriers' costs of "regulatory compliance and proceedings," a far more amorphous concept. In either case, it appears that the IXCs are over-recovering their costs associated with the specific programs cited, and even the costs the carriers incur associated with the shadowy concept of "regulatory compliance and proceedings."

With regard to specific regulatory programs cited by the IXCs, the Commission's rules and orders permit carriers to recover their costs associated with such programs. However, the

[109] *See Joint Advertising Policy*, ¶ 20.

surcharges carriers are imposing exceed – sometimes vastly exceed – their costs of complying with such programs.

For example, in its most recent order, the Commission approved a total interstate TRS fund requirement for July 2003 through June 2004 of $115,455,570, with a carrier contribution factor of 0.00149 (or 0.149%).[110] This represented an increase in the carrier contribution factor from 0.00080 (0.08%) approved by the Commission in the preceding fund year.[111] With regard to costs of compliance with the NANP, the Commission most recently approved a NANP Administration contribution factor for July 1, 2003 through June 30, 2004 of 0.000036 (0.0036%).[112] This represented a decrease from the contribution factor of 0.000043 (0.0043%) applicable during the fund years from July 1, 2001, through June 30, 2003.[113]

As the foregoing makes clear, the carriers' contribution factors to support interstate TRS

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[110] *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Docket No. 98-67, DA 03-2111, ¶ 40 (rel. June 30, 2003).

[111] *See Proposed Payment Formula and Fund Size Estimate for the Interstate TRS Fund for July 2002 Through June 2003*, Public Notice, CC Docket No. 90-571, DA 20-1422, p. 2 (rel. June 14, 2002).

[112] *See In the Matter of Administration of the North American Numbering Plan and North American Numbering Plan Administration Contribution Factor and Fund Size for July 2003 Through June 2004,* Order, CC Docket No. 92-237, DA 03-2062, ¶ 7 (rel. June 24, 2003).

[113] *See In the Matter of Administration of the North American Numbering Plan and North American Numbering Plan Administration Contribution Factor and Fund Size for July 2002 Through June 2003,* Order, CC Docket No. 92-237, DA 02-1500, ¶ 9 (rel. June 27, 2002); *see also In the Matter Administration of the North American Numbering Plan and North American Numbering Plan Administration Contribution Factor and Fund Size for July 2001 Through June 2002,* Order, CC Docket No. 92-237, NSD File No. L-01-96, ¶ 8 (rel. June 27, 2001).

or the NANP are extremely small. Consequently, the amount carriers pass on to customers each month for costs associated with the carriers' provision of interstate TRS and NANP compliance should be minimal – pennies per month. For example, assuming an average monthly residential long distance bill of $30, the total that residential customer should pay for interstate TRS and NANP compliance would be $0.0448 per month – less than a nickel. The carriers are recovering far more than this nominal sum from customers, however, through their surcharges.

Since carriers often combine contributions for TRS and NANP compliance together with other costs of doing business in their surcharges, there is no way of knowing precisely how much customers are being overcharged for carriers' TRS and NANP compliance costs. But given the levels of fixed monthly surcharges customers pay to carriers like AT&T, BellSouth, Sprint, OneStar, and TalkAmerica, the over-recovery appears substantial. Even MCI's Carrier Cost Recovery Charge – which at first blush looks fairly reasonable, at least compared to some of other IXCs' surcharges – appears excessive when compared to the regulatory costs MCI's charge purportedly recovers. Again, assuming a $30 average monthly long distance bill, an MCI customer would pay $0.42 for the company's Carrier Cost Recovery Charge. Forty-two cents is not a large amount of money on a monthly bill, but it is still 800% more than the amount MCI is obligated to contribute for interstate TRS and NANP compliance under this hypothetical.[114]

b. The CMRS Carriers' Surcharges.

Likewise, the wireless carriers' surcharges are unjust and unreasonable, and in violation

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[114]Of course, the annual amount associated with each surcharge grows very large when accumulated over the thousands or millions of customers served by the carriers.

of Section 202 of the 1934 Act, since those charges either purport to recover costs that the Commission has never authorized the carriers to recover from end users, or greatly over-recover amounts authorized by the Commission.

(i) Recovery for "number pooling."

Many of the CMRS carriers' "regulatory" surcharges (*e.g.*, Cricket Communications, Nextel, Sprint PCS and Western Wireless) purport to recover, among other things, costs associated with number pooling. To NASUCA's knowledge, the Commission has never authorized an end-user charge for number pooling.[115] For the carriers to suggest that their surcharges recover number pooling costs appears to be misleading at best.

It is conceivable that the wireless carriers are recovering their NANP compliance costs under the misnomer "number pooling."[116] If so, this label strikes NASUCA as a particularly inapt description of the regulatory program to which the surcharge is linked. If, however, NANP compliance costs are what the wireless carriers are recovering under the moniker of "number pooling," then the carriers are recovering far more than their Commission-established assessment for NANP compliance.

As discussed in connection with the IXCs' surcharges, the contribution CMRS carriers

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[115]Apparently, Commission staff is likewise unaware of any such authorization. *See* CPI Article, p. 5 (quoting Peter Trachtenberg, Attorney Advisor, Wireless Telecommunications Bureau – Public Policy Division).

[116]All telecommunications carriers contribute, on a competitively neutral basis, to meet the costs of numbering administration. *See* 47 C.F.R. § 52.17. Given the sophistication of the wireless carriers, it seems improbable that they innocently chose the more ambiguous phrase "number pooling" rather than "NANP compliance," as the IXCs use to identify these costs.

are expected to make for administration of the NANP is tiny. Certainly the wireless carriers' NANP assessment nowhere approaches the level of the surcharges imposed by these carriers (*e.g* , $0.45 to $1.70 per month).[117]

(ii) Recovery for number portability.

Perhaps the most egregious example of the wireless carriers' over-recovery of regulatory "compliance" costs involves the nearly universal practice of including number portability requirements among the carrier costs being recovered.

As the Commission is well aware, the wireless industry waged a vigorous campaign against the imposition of number portability since the Commission first indicated portability would be required in 1996.[118] However, while the wireless carriers were simultaneously waging

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[117]Verizon Wireless, which until recently charged $0.05 per month for number pooling, came closest to assessing its customers an appropriate amount for NANP compliance.

[118]*See In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (rel. July 2, 1996). A brief summary is appropriate. Wireless carriers first petitioned for reconsideration of the Commission's decision, requiring number portability to be implemented by June 30, 1999, which the Commission rejected. *In the Matter of Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, FCC 97-94 (rel. March 11, 1997). Then Verizon Wireless' predecessor sought review of the Commission's decision in the D.C. Circuit, which was subsequently transferred to the 10th Circuit. *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir., filed May 30, 1997). Shortly thereafter, the wireless carriers' trade association (the Cellular Telecommunications & Internet Association, or "CTIA"), filed a petition with the Commission seeking temporary forbearance from the June 30, 1999, portability implementation date. The Commission granted that petition and extended the implementation date to November 24, 2002. *In the Matter of Telephone Number Portability*, Memorandum Opinion and Order, CC Docket No. 95-116, FCC 99-19 (rel. Feb. 9, 1999). In light of the Commission's decision, the appeal pending before the 10th Circuit was withdrawn. On July 26, 2001, Verizon Wireless then sought permanent forbearance of the wireless number portability deadline. The Commission denied that petition, however, though it extended the deadline again – this time to November 24, 2003. *In the Matter of Local Number Portability*, (Footnote con't.)

frontal assaults on the Commission's decision and rearguard actions to delay number portability's implementation, they were also conducting covert operations against their customers – by billing them for the carriers' compliance costs long before portability's implementation date. How much of the money carriers collected for compliance actually went to fund the carriers' legal and political battles against number portability probably can never be known – but it must have been substantial.[119]

While there is no way of knowing whether the amounts wireless carriers have collected for number portability exceed the carriers' direct costs to implement number portability,[120] the facts strongly suggest that CMRS carriers have grossly over-recovered or overstated their costs of implementing number portability, in violation of Section 202 of the 1934 Act. As reported by the CPI, wireless carriers apparently began charging customers for their number portability costs in January 2002.[121] The carriers began imposing such fees despite the fact that the Commission-

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Order, CC Docket No. 95-116, FCC 02-215 (rel. July 26, 2002). In the wake of that decision, Verizon Wireless filed an appeal of the Commission's number portability rules with the D.C. Circuit, finally losing that appeal on June 26, 2003. *See CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2003). A further extension of the wireless number portability deadline was later denied by the Commission. *In the Matter of Number Resource Optimization, et al.*, Order, CC Docket Nos. 99-200 & 95-116, DA 03-3744 (rel. Nov. 24, 2003).

[119]NASUCA is not suggesting that the wireless carriers' efforts to defeat or delay number portability were improper. However, NASUCA believes that passing the costs incurred in that effort on to customers in the form of a surcharge, all the while advising those customers that the surcharge is to cover the carriers' compliance costs, is deceptive, misleading and unreasonable.

[120]To NASUCA's knowledge, the CMRS carriers have never been required to quantify their costs of implementing number portability, nor have they ever been required to demonstrate that the surcharges bear a reasonable relationship to those costs.

[121]CPI Article, p. 2. Nextel reportedly was the first CMRS carrier to begin charging such a fee. The fee was initially $0.55 per month but was tripled nine months later – to $1.55 per month. *Id.* Interestingly, it was only *after* the Commission extended the number portability deadline for (Footnote con't.)

mandated implementation deadline for wireless number portability was then November 24, 2002 (and was later extended to November 24, 2003).

Although the Commission authorized carriers to recover their costs of implementing number portability early on,[122] it never directly addressed the propriety of CMRS carriers recovering their number portability costs prior to the deadline for implementing portability. The Commission provided some compelling guidance, however.

After recognizing "consumers' sensitivity to end-user charges,"[123] the Commission authorized carriers not subject to rate regulation (*e.g.*, competitive LECs, CMRS providers and IXCs) to "recover their carrier-specific costs *directly related* to providing number portability *in any lawful manner consistent with their obligations under the Communications Act.*"[124] Addressing this issue further – in the context of incumbent LECs – the Commission determined that:

> [R]ecovery from end users should be designed so that *end users generally receive the charges only when and where they are reasonably able to begin receiving the direct benefits of long-term number portability.*[125]

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wireless carriers to November 24, 2003, that Nextel tripled its portability surcharge.

[122] *See In the Matter of Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, FCC 98-82 (rel. May 12, 1998) ("*LNP 3d R&O*").

[123] *Id.*, ¶ 135.

[124] *Id.*, ¶ 136 (emphasis added).

[125] *Id.*, ¶ 142 (emphasis added). The Commission then set a start date when incumbent LECs could begin imposing number portability surcharges only after number portability obligations commenced, and limited the period of time the carriers could impose such charges to five years. *Id.*

In its subsequent order classifying costs considered "directly related to providing portability," the Commission reaffirmed the principle that carriers should not be allowed to impose number portability charges before they are obligated to provide number portability.[126] In the *LNP Cost Classification MO&O*, the Commission agreed that "investments made by an incumbent LEC prior *to LNP implementation cannot be considered direct costs incurred to provide number portability*."[127]

NASUCA can conceive of no reason why the same principle, that incumbent LECs should not be allowed to impose charges covering number portability implementation costs before customers are reasonably able to begin receiving portability's benefits, should not apply to wireless carriers. Certainly the Commission has never indicated that this principle should apply only to incumbent LECs but not to wireless carriers. [128] Nor can NASUCA conceive of any reason why the principle ought to be applied disparately to incumbent LECs and wireless carriers. If carriers should not impose number portability-related charges until their customers can reasonably expect to receive the benefit of portability, then wireless carriers' imposition of line item charges to recover their implementation costs a year or more before customers could port their numbers was unreasonable and unjust.

[126] *In the Matter of Telephone Number Portability Cost Classification Proceeding*, Memorandum Opinion and Order, CC Docket No. 95-116, DA 98-2534 (rel. Dec. 14, 1998) ("*LNP Cost Classification MO&O*").

[127] *Id.*, ¶ 18

[128] In fact, the Commission concluded that all carriers – including IXCs and CMRS carriers -- should bear their costs of establishing local number portability on a "competitively neutral basis." *LNP 3d R&O*, ¶ 36. This suggests that the same principles applicable to incumbent LECs regarding when they can recover their number portability costs, as well as what those costs include, should apply equally to CMRS carriers.

Moreover, the CMRS carriers' surcharges appear to over-recover the carriers' costs of implementing number portability. According to the CPI Article, in advance of the start date for implementing wireless number portability, CMRS carriers had recovered approximately $629 million from end user charges whose primary component was number portability. For example, CPI calculated that Nextel had recovered $283 million from its customers through its "Federal Programs Cost Recovery Fee" by October 2003, almost triple the $100 million price tag for portability calculated by the company.[129]

Similarly, CPI noted that if just $1 of AWS' $1.75 monthly surcharge went to number portability implementation costs, the carrier would collect about $84 million per year and pay off its estimated implementation costs in less than two years.[130] Likewise, CPI reported that – at least as of October 20, 2003 – Verizon Wireless anticipated adding $0.10 to $0.15 per customer per month to recover its estimated $60 million implementation cost estimate. According to CPI, a $0.10 to $0.15 monthly fee would generate $39 to $58 million per year and would allow Verizon Wireless to recover its implementation costs in as little as one year.[131] However, as noted above, Verizon Wireless has announced that, effective March 1, 2004, it is adding $0.40 to its monthly surcharge to recover its number portability implementation costs. If CPI's report is accurate, Verizon Wireless' fee increase would allow it to recover its number portability implementation costs in approximately five months.

The Commission's observations regarding incumbent's costs of providing local number

[129] CPI Article, p. 2.
[130] CPI Article, p. 5.
[131] *Id.*

portability in the *LNP 3d R&O* also suggest that the CMRS carriers are overcharging their customers for the costs of implementing wireless number portability. In the *LNP 3d R&O*, the Commission opined that the cost data in the record before it indicated that incumbent LECs, competitive LECs and CMRS carriers competing in the local market "are likely to have approximately the same long-run incremental number portability cost of winning a subscriber."[132] The Commission noted that incumbent LECs could spread their large absolute costs of implementing number portability over a larger customer base, while competitors and wireless carriers would have fewer absolute costs because of their smaller networks but would have smaller customer bases over which to spread those costs.[133] In other words, all things being equal, the carriers' number portability end user charges should be roughly the same. That has not proven to be the case with CMRS carriers when they are allowed to recover costs "in any lawful manner."

Based on tariff filings with the Commission, incumbent LECs' number portability end user charges ranged from $0.23 to $0.43 per month.[134] The CMRS carriers' lowest surcharges are at the high end of incumbent LECs' charges; the highest are perhaps six or seven times that amount (the $2.83 charged by Nextel).

Moreover, it appears that at least some of the wireless carriers are over-recovering their

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[132] *LNP 3d R&O*, ¶ 137.

[133] *Id.*

[134] *See, e.g.*, Verizon Telephone Companies Tariff F.C.C. No. 1, § 13.3.16 ($0.23); BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, § 13.3.21 ($0.35); Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, § 4.9 ($0.35); Nevada Bell Tariff F.C.C. No. 1, § 19.5 ($0.41); Qwest Corporation Tariff F.C.C. No. 1, § 13.19.2 ($0.43).

direct costs associated with implementing wireless number portability, as is strongly suggested by their widely varying estimated implementation costs. For example, according to CPI, Verizon Wireless estimates its number portability implementation costs at $60 million, spread among its 32.5 million customers – in other words, less than $2 per customer per year.[135] Compared to Verizon Wireless, Cingular's per customer implementation cost was 300-400% higher, while Nextel's was nearly 500% higher.[136] Nearly six years ago, when the Commission authorized the recovery of number portability costs through carrier end-user charges, it noted that it expected carriers' costs to be roughly equivalent: carriers with smaller networks would have lower absolute costs but smaller customer bases over which to spread those costs while larger carriers would have larger overall costs spread over a larger customer base.[137] The wireless carriers' claims defy this expectation.

One possible explanation for the disparity, noted in the CPI Article and apparently corroborated by Cingular's spokesperson, is that some wireless carriers are including marketing costs in their number portability implementation costs.[138] The CPI Article suggested that

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[135]CPI Article, p. 2.

[136]With nearly 22 million customers, Cingular estimated its number portability implementation costs at $152 to $177 million, or $7 to $8 per customer per year. Nextel, with 10.6 million customers, projected its implementation costs at roughly $100 million, or nearly $10 per customer per year. *Id.*, p. 2; *see also In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Report, WT Docket 02-379, FCC 03-150, (rel. July 14, 2003), Appendix D-8 (providing number of subscribers for the top 25 CMRS carriers in the U.S.).

[137]*LNP 3d R&O*, ¶ 137.

[138]CPI Article, p. 3.

Commission rules do not prohibit the carriers from recovering such costs.[139] This is incorrect. In the *LNP 3d R&O*, the Commission made it clear that carriers not subject to rate regulation, including wireless carriers, "may recover their carrier-specific costs *directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act*."[140]

The Commission made it clear that it narrowly defined the universe of "costs directly related to providing number portability:"

> We conclude that *carrier-specific costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services*, such as for the querying of calls and the porting of telephone numbers from one carrier to another. *Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability.*
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> * * *
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> Because carrier-specific costs directly related to providing number portability only include costs carriers incur specifically in the provision of number portability, *carriers may not use general overhead loading factors in calculating such costs*. . . . Instead, carriers may identify as carrier-specific costs directly related to providing long-term number portability only those incremental overheads that they can demonstrate they incurred specifically in the provision of long-term number portability.[141]

The Commission subsequently made it crystal clear that it had "adopted a very narrow definition" of the costs directly related to providing number portability.[142]

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[139] *Id.*

[140] *LNP 3d R&O*, ¶ 136 (emphasis added).

[141] *LNP 3d R&O*, ¶¶ 72 & 74 (emphasis added); *see also id.*, ¶ 36.

[142] *See LNP Cost Classification MO&O*, ¶ 12. The Commission identified three types of local number portability costs eligible for recovery. "Dedicated LNP costs," the Commission wrote, "are the incremental costs of investments or expenses that are dedicated exclusively to provision (Footnote con't.)

To the extent wireless carriers are recovering sales, marketing or other indirect costs of business in their number portability surcharges, that action is unjust and unreasonable under the Commission's orders addressing recovery of local number portability costs, as well as Section 202 of the 1934 Act.

(iii) Recovery of CALEA costs.

At least one CMRS carrier claims its monthly surcharge recovers its costs of providing E911 or compliance with CALEA.[143] As with number pooling and number portability, this carrier's action appears to violate Section 202 of the 1934 Act's prohibition against unreasonable or unjust practices or charges.

Western Wireless claims that its monthly surcharge helps offset the cost of complying with CALEA. CALEA requires telecommunications carriers – including wireless carriers – to ensure that their "equipment, facilities, or services" used to originate, terminate, or direct communications are capable of enabling the government, pursuant to court order, to intercept "all wire and electronic communications carried by the carrier within a service area" in real

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of LNP functions." *Id.*, ¶ 21. "Joint costs" of providing LNP consisted of "incremental costs associated with new investments or expenses that directly support the provision of LNP functions and also support one or more non-LNP functions." *Id.*, ¶ 22. Finally, the Commission defined "overheads incremental to providing LNP" to include only "new overhead costs" were eligible for recovery. *Id.*, ¶ 34. Based on the principles set forth in the *Portability Cost Classification MO&O*, the Commission rejected incumbent LECs' efforts to include costs associated with wholesale account support, sales, human resources and telemarketing as overheads incremental to providing LNP. *In the Matter of Long-Term Number Portability Tariff Filings*, Memorandum Opinion and Order, CC Docket No. 99-35, FCC 99-158, ¶¶ 85, 91, 97-99 (rel. July 16, 1999).

[143] Pub. L. No. 103-414, 108 Stat. 4279 (1994), *codified at* 18 U.S.C. § 2522 *and* 47 U.S.C. §§ 229(a), 1001-1009 & 1021.

time.[144] CALEA makes the U.S. Attorney General responsible for paying carriers their costs incurred to modify equipment, etc. deployed prior to January 1, 1995.[145] Likewise, for equipment, etc. deployed after January 1, 1995, if the Commission determines that compliance with the assistance capability requirements of Section 1002 of CALEA is not "reasonably achievable," then the federal government is again responsible for paying carriers to make modifications to bring about such compliance.[146] In order to carry out CALEA's objectives, Congress authorized the appropriation of $500 million over fiscal years 1995-1998.[147]

In short, the federal government – not carriers -- is obligated to pay carriers' CALEA compliance costs for equipment, facilities and service deployed prior to January 1, 1995. For equipment, etc. deployed after this date, the federal government may be obligated to compensate carriers for their compliance costs if the Commission grants a petition for relief filed under Section 109(b) of CALEA. If the government does not agree to provide such compensation upon the granting of a carrier's petition, then the carrier is relieved from the obligation to comply. The Commission has identified the types of costs that carriers must identify in any petition for relief

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[144] 47 U.S.C. § 1002(a)(1).

[145] 47 U.S.C. § 1008(a).

[146] 47 U.S.C. § 1008(b)(1) & (2).

[147] 47 U.S.C. § 1009. Congress refused to appropriate the $100 million authorized in 1997 unless there was an acceptable implementation plan in place. Huber, *et al.*, "Federal Telecommunications Law," § 8.5.1.3, p. 695 (2d Ed., 1999).

filed under Section 109(b) of CALEA,[148] noting that only those costs directly related to making equipment CALEA compliant.[149] Finally, the Commission has noted that, in implementing Section 109 of CALEA, it should "seek to minimize any adverse effects of CALEA compliance on quality of service *and subscriber rates*."[150]

In short, the Commission has never authorized carriers to impose subscriber line items to recover their CALEA compliance costs. To suggest otherwise, as Western Wireless does, is deceptive and misleading. Moreover, there is no way of knowing whether Western Wireless is over-recovering its putative costs of complying with CALEA. If it is recovering costs associated with equipment deployed prior to January 1, 1995, then its action is unreasonable since such costs are the responsibility of the federal government. If Western Wireless is recovering costs associated with making equipment deployed after January 1, 1995, compliant with CALEA, then that action ought to be considered unreasonable if the company took no action to obtain relief under Section 109(b) of CALEA before imposing a surcharge on its customers. In addition,

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148 Federal law enforcement agencies made this point clear in their recent filing with the Commission, seeking expedited rulemaking to resolve "outstanding issues" regarding full implementation of CALEA. *See In the Matter of United State Department of Justice, et al.,* Joint Petition for Expedited Rulemaking, RM-10865 (filed March 10, 2004). The agencies opined that Section 109(b) of CALEA makes it clear that carriers are responsible for the costs of bringing post-January 1, 1995, equipment into compliance with CALEA, but noted that "carriers continue to express uncertainty concerning who bears responsibility" for such costs. *Id.*, p. 64. Citing other instances in which the Commission has authorized end-user surcharges (*e.g.*, E911, local number portability), the agencies ask the Commission to issue rules allowing carriers to recover their compliance costs for such equipment through end-user surcharges. *Id.*, p. 64-66. Like surcharges for E911 and local number portability, the agencies assert, that CALEA surcharges must be limited to incremental costs directly related to CALEA compliance. *Id.*, p. 66 & Fn. 108.

149 *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, CC Docket No. 97-213, FCC 99-229, ¶¶ 39-40 (rel. Aug. 31, 1999).

150 *Id.*, ¶ 41 (emphasis added).

there is no way to know whether Western Wireless is recovering only those incremental costs it incurs that are directly related to making its equipment, etc. compliant with CALEA.

For all the foregoing reasons, Western Wireless' line item charge is unjust and unreasonable to the extent it purports to recover the carrier's costs of compliance with CALEA.

(iv) Recovery of E911 implementation costs.

With regard to E911 service, a number of wireless carriers claim that their monthly surcharges, in whole or part, recover their E911 compliance costs. These surcharges, likewise, are deceptive, misleading and unreasonable and should be disallowed by the Commission.

Nearly eight years ago, the Commission determined that wireless carriers would be required to implement E911 service in two phases. Phase I requires CMRS carriers to be able to provide automatic number identification ("ANI") information to public safety answering points ("PSAPs"), basically allowing PSAPs to be able to call back mobile phone users reporting an emergency. Phase II requires wireless carriers to provide automatic location identification ("ALI") information to PSAPs, basically allowing PSAPs to pinpoint the location of mobile phone users reporting an emergency.[151]

In order to limit the costs CMRS carriers would have to incur to provide either Phase I or

[151]*See In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-102, FCC 96-264, ¶¶ 63-72 (rel. July 26, 1996) ("*Wireless E911 1st R&O*").

[153]*See In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, CC Docket No. 94-102, FCC 99-352, ¶¶ 23, 65-72 (rel. Dec. 8, 1999) ("*Wireless E911 2d R&O*"). The Commission initially had made CMRS carriers' obligation to implement E911 service contingent upon the adoption of a cost recovery mechanism. *Wireless E911 1st R&O*, ¶ 89.

Phase II E911 capabilities, the Commission adopted several safeguards. One safeguard was conditioning the carrier's obligation to provide E911 service upon a PSAP's demonstration that it has the financial ability to purchase equipment necessary to allow it to utilize the ANI/ALI information being provided by the carrier.[153] As a second safeguard, the Commission made it clear that PSAPs were obligated to pay for much of the network infrastructure needed to implement E911 service.[154] The vast majority (40 or more) of states have established funding mechanisms to enable their PSAPs to pay for such infrastructure, or to help CMRS carriers recover their costs of E911 implementation, generally through state E911 surcharges that carriers are directed to impose on their customers.[155] Third, the Commission expressly authorized wireless carriers to recover their costs of implementing E911 "in their rates."[156]

Wireless carriers may indeed be recovering some of their E911 costs in their rates. However, in contravention of the Commission's directive, many are recovering E911 costs through explicit surcharges rather than in their rates for the telecommunications services provided. Most carriers refer to this as a "Federal E911" surcharge, creating the impression that the Commission has directed or authorized imposition of the surcharge when, in fact, it has not.

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[154] *Id.*, ¶¶ 63, 69.

[155] *See* http://www.nena.org/Wireless911/PDF/State%20Wireless%20Funding%2011-16-01.PDF (updated May 13, 2002). These surcharges range from $0.25 to $1.00 or more per month.

[156] *Wireless E911 2nd R&O*, ¶ 54.

[159] Sprint PCS recovers a separate, $0.40/month surcharge for "Federal E911." The other wireless carriers' surcharges simply include E911 among the basket of regulatory costs their surcharges purportedly recover. Among these carriers, US Cellular imposes a $0.55/month surcharge, Western Wireless imposes a $1.70/month surcharge (it was $0.97/month prior to January 20, 2004), and Nextel imposes either $1.55/month or $2.83/month. It is impossible to determine whether other wireless carriers are recouping their E911 costs through their surcharges since many, like AWS, Cingular and Western Wireless, simply claim to recover "costs relating to regulatory programs" or the like.

This impression is reinforced in customers' minds by the fact that the carriers usually list their "Federal E911" surcharge on a customer's bill immediately before or after the state E911 fee that carriers have been directed to impose on their customers by state governments. In view of the foregoing, the "Federal E911" surcharge being imposed by carriers is deceptive and misleading, and in apparent contravention of the Commission's E911 orders.

The carriers also appear likely to be over-recovering their E911 implementation costs through "Federal E911" surcharges. As previously noted, the surcharges purporting to recover the wireless carriers' E911 compliance costs range from \$0.40 to \$2.83 per month.[159] Aside from Sprint PCS, there is no way of knowing how much of the money collected by wireless carriers should be attributable to E911 compliance, nor is there any way of knowing whether the money collected through the carriers' surcharges bears any reasonable relationship to the carriers' actual compliance costs. For Sprint PCS, the amount of money recovered annually through its \$0.40 Federal E911 surcharge is at least calculable – and it is significant.[160]

c. The Carriers Are Exploiting Loopholes in the Commission's TIB and Contribution Orders.

Nothing in the Commission's *TIB Order* and *Contribution Order* specifically tells carriers what surcharges they may impose to recover their costs of complying with regulatory action, or how those surcharges should be calculated. Carriers were left free to recover, or over-

[160]At the end of 2002, Sprint PCS had approximately 14.8 million customers nationwide. At \$0.40 per customer line, per month, Sprint PCS recovers \$7.1 million annually through its Federal E911 surcharge. This is a huge sum of money, especially when one remembers that the PSAPs are paying at least a share of the costs of implementing E911, and when one considers the fact that Phase II technology will have commercial utility.

recover, their costs through whatever fee or surcharge scheme they can concoct as long as: (1) the surcharge appears as a separate line item on a customer's bill, (2) the carrier provides some explanation – accurate or not – of what the charge is intended to recover, and (3) the carrier advises customers that the surcharge is not directly required by government action.

Given the growing epidemic of surcharges being used by IXCs and CMRS carriers, and the incentives carriers have to make use of such fees, the Commission's current "truth-in-billing" restrictions are inadequate to protect telecommunications consumers. Moreover, the Commission's "hands off" approach to CMRS carriers in particular, and to telecommunications carriers' surcharges generally, coupled with the pressures of competition, have given carriers both the incentive and the opportunity to gouge their customers through the imposition of surcharges, line items and fees.

4. Competition Is Not the Cure and Instead May Be Part of the Problem.

No doubt carriers will cite the protection provided by the "invisible hand" of the competitive marketplace and will assert that there is no legitimate reason for the Commission either to regulate or to prohibit their practice of recovering operating costs through surcharges rather than in their monthly or per-minute rates for the telecommunications services provided. Contrary to such assertions, however, the existence of a competitive marketplace does not eliminate the need for Commission regulatory oversight. In fact, the competitive telecommunications market may exacerbate the problem, by encouraging carriers to understate their usage-based rates or monthly service rates, and to boost their revenues with surcharges. Once some carriers begin using surcharges to artificially lower the price of their offered services, other carriers are virtually compelled to follow suit, or risk the loss of market share.

The Commission itself rejected arguments that the competitive marketplace alone is sufficient to protect consumers when it promulgated rules requiring telecommunications carriers to comply with its "truth-in-billing" guidelines. A number of passages in the *TIB Order* are worth quoting in response to the argument that the Commission should rely exclusively on the competitive marketplace to police companies' decisions to impose monthly surcharges to recover their operating costs. Regarding the general problem of consumer confusion over billing and charges, the Commission wrote:

> Unfortunately, as a by-product of [changes in the telecommunications market resulting from the Telecommunications Act of 1996], we have also seen growing consumer confusion concerning the provision of these services and an increase in the number of entities willing to take advantage of this confusion. . . . Beyond [slamming and cramming], we have seen a substantial rise in the number of complaints generally arising out of consumers' confusion concerning charges on their telephone bills. Since for most consumers, the monthly telephone bill is their primary source of information and point of contact with respect to their telecommunications services providers, these complaints are strong evidence that consumers are not getting necessary information in a format that allows them to make informed choices in this market.[161]

In response to arguments that the Commission leave consumer protection to the dynamics of the competitive marketplace, the Commission stated:

> In taking action today, we recognize that, at this time, *competitive pressures alone do not ensure that consumers receive clear, informative and consumer-friendly telephone bills* . . . .
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> *Even in competitive markets, however, disclosure rules are needed to protect consumers*. . . . [O]ur principles and guidelines will protect consumers from misleading and inaccurate billing practices.[162]

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[161] *TIB Order*, ¶ 4.

[162] *Id.*, ¶¶ 6-7 (emphasis added).

In the *TIB Order* the Commission tacitly recognized that competition and the lack of tighter restrictions on carriers' billing practices encourages carriers to over-recover their operating expenses through surcharges. The Commission made similar observations in the *Contribution Order*.[163] Allowing carriers to recover, and over-recover their operating expenses through monthly line items, surcharges and fees produces the perverse result of enabling economically inefficient carriers to maintain their position in the competitive marketplace.

The dynamics of the competitive telecommunications market have not changed sufficiently in the almost five years since the *TIB Order* was issued to render the Commission's rationale obsolete.[164] Although the invisible hand of the marketplace may eventually push out inefficient carriers that gouge customers through excessive fees and surcharges, the offending carriers' customers suffer in the meantime.

D. Prohibiting the Surcharges at Issue Does Not Violate Supreme Court Rulings Addressing Federal Agencies' Power to Regulate Commercial Speech.

NASUCA urges the Commission to issue a declaratory ruling prohibiting carriers from imposing any line item surcharges, other than those specifically required by federal, state or local government action, on the grounds such surcharges are unreasonable, unfair, deceptive and

[163] *See Contribution Order*, ¶ 48.

[164] Indeed, Congress has recognized that, even in mature competitive markets, efforts must be taken to better inform consumers and to counter deceptive marketing or pricing practices. Accordingly, it has authorized the FTC to enforce consumer protection provisions under 31 federal statutes, including the 1996 Act, the Telephone Disclosure and Dispute Resolution Act, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (*see* http://www.ftc.gov/ogc/stat3.htm). Under such statutes, and implementing regulations, the FTC attacks deceptive practices ranging from price fixing by health maintenance organizations to unfounded claims about the benefits of dietary supplements and other health products (*see* http://www.ftc.gov/).